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IN THE

Supreme Court of the United States

October Term, 1972

No.....

[redacted] and
TED DEAN BUTLER,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Warren Burger and to the Honorable Associate Justices of the Supreme Court of the United States:

Come now [redacted] Ted Dean Butler and petition this Honorable Court for a writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit to review and reverse judgments of conviction of the charges of conspiracy set forth in Count One and Count Five of the indictment, and upon which indictment two trials and two punishments were inflicted.

The case raises important questions of criminal law and procedure which require this Court's determination on issues of great gravity and general importance in the public interest and in order for this Court to exercise its supervisory power in criminal cases and to establish uniformity of decision

Non-disclosure of deal with informer: *Napue v. Illinois,* 360 U.S. 264, 3 L.ed.2d. 1217; *Giglio* v. U.S., 31 L.ed.2d 104; *Hoffa v. U.S.,* 385 U.S. 293, 17 L.ed. 2d 374; *Mesarosh v. U.S.,* 352 U.S. 1, 14, 1 L.ed.2d 1, 9; *McNabb v. U.S.,* 318 U.S. 332, 341, 87 L.ed. 819, 824.

Double jeopardy, where there are two trials before two different juries on the same indictment: *No. Carolina v. Pearce,* 395 U.S. 711, 23 L.ed.2d 656; *Patton v. No. Carolina,* 393 U.S. 922, 21 L.ed.2d 258; *Benton v. Maryland,* 395 U.S. 784, 23 L.ed. 2d 707; *Green v. U.S.,* 355 U.S. 184, 2 L.ed.2d 199; *In re Neilson,* 131 U.S. 176, 33 L.ed. 118.

Certification as to the effect of admitted and other errors on verdicts: *Chapman v. California,* 386 U.S. 18, 17 L.ed.2d 705.

Vagueness and uncertainty of statute: *Connelly v. General Construction Co.,* 269 U.S. 385, 391, 70 L.ed. 322, 328; *Lanzetta v. New Jersey,* 306 U.S. 451, 453, 83 L.ed. 888; *Winters v. New York,* 333 U.S. 507, 92 L.ed. 840.

Lack of proof of defendants' participation in any

conspiracy; conviction violates due process where there is no evidence to support it: *Shuttlesworth v. Birmingham,* 382 U.S. 87, 15 L.ed.2d 176; *Thompson v. City of Louisville,* 362 U.S. 199, 4 L.ed.2d 654.

Your petitioners, Robert Butler and Ted Dean Butler, unrelated, were charged in a single indictment with two alleged conspiracies (Count One and Count Five of the indictment). Count One charged conspiracy to possess for sale and to sell dangerous drugs, to-wit, amphetamine tablets and barbiturate capsules, in violation of Title 21 U.S.C. Sec. 331(q), and in another count, to-wit, Count Five, conspiracy to conceal, transport and sell heroin, in violation of Title 21 U.S.C. Sec. 174, and Title 18 U.S.C. Sec. 371.

The same grand jury returned the single indictment of the two alleged conspiracies. A motion to sever Count One and Count Five was granted on the ground that to try them together would be prejudicial, but motions to hold that it was prejudicial to present the same evidence before the same Grand Jury for a single indictment were denied.

The Judge then proceeded to try the defendants before a jury on Count One of the indictment and proceeded to draw another jury over the objections of the defendants Butler, while the first jury was deliberating. He allowed the Butlers to plead once in Jeopardy, but denied their right to present evidence on the jeopardy plea or any relief by judgments of acquittal on

their pleas of once in jeopardy, including a motion to dismiss after the two juries had each returned verdicts of guilty o nthe same indictment and they had received double punishment on the same indictment. Robert Butler 2 years on count 1; 7 years on count 5; Ted Butler 2 years count 1; 15 years on count 5, concurrent.

JURISDICTION

Jurisdiction is conferred by Title 28, Section 1254, U.S.C.

The opinion of the Court of Appeals was filed August 24, 1972. A petition for rehearing was duly filed with the Court of Appeals and supplemented by a letter to the Court pointing out certain and numerous errors in the opinion of the Court of Appeals. The letter was dated September 5, 1972. The Court, on February 7, 1973, denied the petition for rehearing but amended its opinion on the denial of the rehearing. It still failed to deal with or discuss the false representations made by the government counsel and by its principal witness, John Durden, and the violations of this Court's decision in *Napue v. Illinois,* 360 US 264, 3 L.ed.2d 1217, and *Giglio v. U.S.,* 31 L.ed.2d 104. It summarily rejected the pleas of once in jeopardy. It failed to certify that none of the errors asserted by the court or by appellants did not fatally infect the verdicts, as required by *Chapman v. California,* 386 U.S. 18, 17 L.ed. 705 (Appendix A-E)

An application for a further reconsideration on be-

half of the Butlers was summarily denied by the writer of the opinion, Judge Wallace, on February 22, 1973, and ordered lodged with the clerk.

This petition for writ of certiorari is being filed within 30 days of the denial of the rehearing of February 7, 1973.

OPINION BELOW

The opinion of the Court below is attached to this petition as Appendix "A", as are the amendments to the opinion, Appendices "B" and "C".

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States; Title 18 U.S.C. Sec. 371; Title 21, Secs. 173, 174, 331(q)(2)(3), 360(a)(b)(c); Title 28, Sec. 1652, and Title 47, Sec. 605, are involved herein.

THE FACTS

On September 9, 1969 John Durden was caught red-handed by federal narcotic agents to whom he was endeavoring to sell amphetamine tablets and barbiturate capsules which he had obtained from Joseph Damian Lovato and Joseph Leo Lovato. It was claimed by the government that he had 50,000 amphetamine tablets and 70,000 barbiturate capsules which he was

seeking to sell to a narcotic agent. (R.T. 662, 1114-15, 1118, 1210, 1333, 1724.)

Three days later, he again was arrested by federal agents, who raided his place of business and seized 45,000 barbiturates and 95,000 amphetamines. (R.T. 1127-1128, 1133.)

Durden had employed a young man named Ted Dean Butler as a handy man and maintenance man. Ted Dean Butler drove in another car over to the parking area while he (Durden) was making delivery or attempting to make a sale and delivery to the undercover narcotic agents. Ted Dean Butler was unaware of Durden's activities but was taken into custody nevertheless. Bail was posted by Durden for himself and for Butler, who was jointly indicted with Durden in U.S. District Court case No. 4847 (AAH)

Durden was also awaiting trials in the State courts of California for alleged theft of automobiles and stolen vehicles. (R.T. 797, 800-802, 945, 947.)

Robert Butler had a dress shop. He had sold clothes to Durden. There is no evidence that Robert Butler had in fact been in any illegal business. Durden had been a customer of his shop for teenage clothes.

After Durden was apprehended trying to sell pills to a federal agent, the officers at the same time also arrested Ted Dean Butler, who was employed by Durden as a maintenance man and was sitting in another automobile with a lady friend. Both Durden and Ted

Butler were taken to jail and booked at the same time. Both were thereafter arraigned on an indictment returned in the Courtroom of U.S. District Judge Hauk, indictment No. 4847. Both were represented by the same attorney until Durden entered into a deal with the government agents to work for them.

Durden sought his way out of this web of illegal entanglement. The narcotic agents had caught a big fly in its web and Durden was doing everything he could to get out of it.

Durden was working with Joseph Leo Lovato and Joe Damian Lovato, who were his sources of supply in Los Angeles. Joseph Leo Lovato was apprehended for this case at his home and appeared until time of trial. Joe Damian Lovato was apprehended and appeared in the early proceedings before the Commissioner but disappeared prior to trial.

A plea bargain or agreement for disposition of the case was entered into between Durden and his lawyers and the government attorney and government agents. Apparently one of the conditions of the bargain or deal was that there would be no revelation of its terms of conditions and that the government and its agents and Durden would vigorously deny that there was any deal. In this effort they were aided both in the trial Court and in another Court. Government counsel in the trial Court said he was in charge of the cases involving Durden and Ted Butler and in no way would the cases against Durden be dismissed. (R.T. 1938,

first trial.) The trial Court ruled that defendants' counsel could not argue to the jury that Durden's case would be dismissed. (R.T. 1968.) In fact,, the Court remarked, that if Durden's indictment were dismissed, the Court personally would "be very much surprised." (R.T. 1969.)

Efforts to find out the proceedings in the Court where Durden had been arraigned in *U.S. v. Durden*, No. 4762, 4847, were blocked. Efforts to get the stenographic notes or the contents thereof in the Court where Durden and Butler had been arraigned were fruitless. Whatever happened in that Courtroom were held either in camera or suppressed and made unavailable to the defendants. Efforts to learn what the deal was in exchange for Durden's testimony were fruitless. The deal was apparently made by Durden's attorney, who could not be found or reached, but the trial Court said that, in any event, his dealings and deals with Durden would be privileged as between "attorney and client."

For over a month Durden cogitated about what he should do while the narcotic agents were dealing with him to "cooperate" with the government and they would tell the Judge what he had done. In the meantime, arrrangements were made for him to be out on his own recognizance and to come to the office of the Narcotic Bureau and Dangerous Drugs Department and make phone calls which they would tape while they sat next to him and for the purpose of using these tapes, if possible, as evidence against the speakers on

the telephone. No permission or consent was received from the telephone company nor were any applications made to any court or Judge for a search warrant nor were the defendants advised that Durden was acting under the specific direction of the narcotic officers, who sat alongside of him with the tape recording going, nor were they advised of their constitutional right to an attorney and that anything they may say could be used against them. The telephone calls to Robert Butler were made directly to his home and constituted an illegal search of the privacy of his home; likewise the calls to his place of business. They were made by Durden with agents listening in. The constitutionality of the Dangerous Drug Act as being too vague and indefinite was attacked (Title 21 U.S.C. Sec. 331(q)(2)(3)).

At no time were any amphetamines or bariturates found or placed in the possession of either Robert Butler or Ted Dean Butler. At no time were either of the men seen or placed at the house of Joe Damian Lovato by any agents or any persons other than statements of Durden, for which he was to receive ultimately complete freedom from his admittedly nefarious activities. The narcotic agents, however, gave him (Durden) the opportunity to transfer his nefarious guilt to the shoulders of Robert Butler and Ted Dean Butler in order to escape himself from the just desserts of his activities.

Government counsel said he was in charge of the

cases involving Durden and in no way would the cases be dismissed. (R.T. 1938.) The Court ruled that counsel could not argue to the jury that Durden's case would be dismissed. (R.T. 1968.) In fact, the Court remarked to counsel that if the Durden indictment were dismissed the Court personally "would be very much surprised". (R.T. 1969.) Yet two months after the case had concluded, the indictment remaining in Judge Andrew Hauk's Court, which was the only indictment against Durden, was dismissed. (R.T. 1238, Judicial notice of District Court files in *U.S. v. Durden,* No. 4762, 4847.) (This is not denied by the government.)

Durden testified after he made his deal to cooperate that he agreed to work with Joe Lovato in the amphetamine and barbiturate business. (R.T. 599, 600, 898.) Allegedly he handled 1,830,000 tablets and capsules and distributed to eleven different customers, including federal agent Robert Sternaman. (R.T. 661, 1118.) He did not mention Robert Butler or Ted Dean Butler. (R.T. 655, 938; R.T. 896; R.T. 901; R.T. 938; R.T. 898; R.T. 897; R.T. 938.) (Robert Sternaman, R.T. 661, 1118; Victor, R.T. 899; Vince, R.T. 899.)

The government agents spent hundreds of hours in surveillance, (R.T. 1230) of which 40 to 50 was outside Leo Lovato's residence and other hours surveilling Robert Butler and Ted Dean Butler. Neither were seen at the Lovato residence by the agents nor with any dangreous drugs or narcotics.

THE GOVERNMENT'S DEAL WITH DURDEN

When federal agents arrested John Durden for the second time, they made a deal for his "cooperation" in drug investigations (R.T. 1133, 1236). After Durden replied he would "cooperate" it was through agent Sternaman's efforts that Durden was released from custody on his own recognizance (R.T. 1236, 1274-75).[1]

Six weeks later, on October 24, 1969, at the office of Durden's attorney, the agents met with Durden and counsel for a lengthy conversation about Durden's cooperation (R.T. 1236-37). To counsel's question about what the government would give in exchange for Durden's help, agent Sternaman said the government promised to bring the results of Durden's cooperation to the attention of the judge at the appropriate time (R.T. 1238). Sternaman claimed "that is the only promise we are ever allowed to make." (R.T. 1238).[2]

In addition to the recognizance release, agent Sternaman interceded for Durden in other ways (R.T. 1273). Durden had already been convicted in state court on two felony counts involving theft and forgery (R.T. 945). Prior to the sentencing hearing the state's chief district attorney on the case received a letter from the regional director of the federal narcotics bureau asking that Durden's "cooperation" be brought to the attention of the state court (R.T. 1276-77). Agent

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[1]Durden obtained release from custody after the earlier federal arrest by posting a $15,000 bond (R.T. 793).

[2]Sternaman testified that Durden heard him make the promise.

Sternaman acknowledged that he had written the letter for the director's signature and that he told Durden about the letter (R.T. 1277, 1283). The state court ordered that Durden be released on probation (R.T. 799).[3]

The two federal indictments[4] against Durden were consolidated into one indictment (R.T. 849) and on October 27, 1969, three days after the "cooperation" agreement was made with Durden and counsel, the government moved to continue the case and Durden was granted severance from his codefendants.[5]. Subsequently, after further continuances, the case was set for June 16, 1970, the day the instant case came to trial (R.T. 156; R.T. 852). Durden's case, which was "totally within (the) authority" (R.T. 1937) of the government prosecutor at bar, was set over until August and the government called Durden as its first witness before the jury impaneled below R.T. 559, 852).

As proceedings commenced the defense moved for exclusion of witnesses but the government requested the two agents in charge of the case be permitted to remain (R.T. 515-16). The court granted the exception and agents Sternaman and Clemente were thus

[3]With regard to the other state felony case against Durden the record indicates that as of June 1970 the matter was still pending; continuances had been granted for the past year and a half, including the nine months of Durden's cooperation (R.T. 853-54).

[4]C.D. Cal. nos. 4762 (10/1/69) & 4847 (10/15/69).

[5]*United States v. Durden*, C.D. Cal. no. 4847 (district court files) (the continuance and severance of October 27, 1969, are not apparent on the present record).

enabled to hear the testimony which their cooperation agreement with John Durden had engendered (R.T. 515-16, 795).

On direct examination the government elicited that Durden had "cooperated" in the investigation "because I had promised my wife I would." (R.T. 709).[6]

Cross-examined about the deal Durden denied that his recognizance release was due to his promising to cooperate (R.T. 793-94),[7] denied that the federal government had interceded in his behalf in the state court (R.T. 798-99), and denied that any promises had ever been made to him in regard to the pending federal charges (R.T. 796).[8] As the probe continued so did the Durden protestations: bail was waived not for the deal (cooperation) but because there was no risk of flight (R.T. 962); probation was not due to any letter but was granted because he was not guilty (R.T. 959); the federal agents "haven't promised me anything," (R.T. 893), and "[n]o consideration was ever given" to the to the federal charges (R.T. 960).

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[6]The court sustained the government's objection later in the proceedings to a defense request for identification of a woman in the courtroom alleged to be Durden's girl friend. (R.T. 1755-57).

[7]Attempts to learn the facts about Durden's bail release met with government objections (R.T. 794).

[8]The text of the exchange at page 796 is as follows:

"Q. Now, sir, have any promises ever been made to you in regard to these cases?"

A. No.

Q. How about your lawyer?

[Government counsel]: Objection, your Honor, it calls for hearsay.

[Defense counsel]: It goes to a state of mind, your Honor.

THE COURT: Were you present at any time when any promises—have any promises been made to you by anyone, as to any benefits that you were to receive from cooperating?

THE WITNESS: No."

On redirect, the government chose to build its case as follows:[9]

> "Q. Now, in regard to your testimony to the jury in this case, Mr. Durden, have you in any way been promised any help or aid from the Government or any member of the Government for this testimony?
>
> "A. No, I have not.
>
> "Q. Are you testifying to the whole truth, sir?
>
> "A. Yes, I am."

When the proceedings were approaching final argument it came to light that there had been a discussion at the most recent postponement of the government's case against Durden which suggested the possibility of a dismissal.[10] The prosecutor assured the court that he had total authority over the Durden case and urged against misconstruction of remarks made by Durden's attorney and an assistant government counsel who was merely filling in and had no knowledge of the case (R.T. 1937). The prosecutor concluded: "May I state for the record I do not intend

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[9]The colloquy occurs at R.T. 993.

[10]The attorney who had negotiated the October 24, 1969, "cooperation" agreement between Durden and the government allegedly said at bench on June 16, 1970, that he knew what was going to happen in Durden's case and indicated there would be no need to set a date for trial (R.T. 1936, 1987, 1990-91). Whether this would support an inference of a prior promise to dismiss the indictment as payment for Durden's cooperation was the subject of much dispute; the speculations about the terms of the cooperation agreement remained unsubstantiated since Durden's attorney was not amenable to service and since the attorney-client privilege would be an obstacle in any event (R.T. 1984-96). There are certain obscure references in the record to information possessed by attorney Wesley Russell about pretrial governmental statements that Durden would not be prosecuted (R.T. 1279-80).

to dismiss the case against John Durden." (R.T. 1938).

Noting the absence of evidence, (which had been suppressed) the court ruled against arguing to the jury that Durden's case would be dismissed (R.T. 1968-69). Indeed, if the Durden indictment were dismissed the court personally "would be very much surprised." (R.T. 1969).

In his testimony about the government's deal with Durden, agent Sternaman had declined to state with certainty that the narcotics bureau could have a case dismissed any time it so desired (R.T. 1278). The agent had acknowledged only the promise to bring the results of Durden's "cooperation" to the attention of the judge at an appropriate time (R.T. 1238). On June 29, 1970, the results of Durden's "cooperation" included six guilty verdicts and by August 17, 1970, the results emerged as a similar number of sentences (R.T. 355, 359, 440).[11] Whether September 29, 1970, was an appropriate time is unknown; the record contains no notation that on that day the district court granted the government's motion to dismiss the indictment in *United States v. Durden*.[12]

In the opening statement of the prosecutor in the second trial of the case, the prosecutor explained that

[11]Though the government had seized more than a quarter of a million dangerous drugs from John Durden's possession, it did not exhibit so much as an aspirin tablet found in the possession of any of the six persons who stand convicted (R.T. 1114-15, 1118, 1127-28, 1133).

[12]Notice may be taken of the court files in *United States v. Durden*, Nos. 4762, 4847 (C.D. Cal.).

"John Durden, the evidence will show, was involved with the Lovatos, involved in selling pills, dangerous drugs; not heroin, but pills. . . . Mr. Durden agreed to cooperate finally after about a month after he was arrested. He will testify that he did agree and the agents proposed to him that he make telephone calls to all the people that he thought were involved in this, and to try to arrange heroin sales to try to find out where the heroin was going." (R.T. 17-18).

The prosecutor also said: "Mr. Durden made phone calls to this Rosa, to the two Butlers here and also, of course, to the Lovatos. These telephone calls were tape recorded because the agents were standing right next to him with the tape recorders. (R.T. 18) * * * The evidence will show and Mr. Durden will testify that the agents told him to arrange heroin sales as I told you. *So you will see that Mr. Durden did arrange for three distributions of heroin from Lovato,* the first one around Thanksgiving, I believe November 27th. (R.T. 21) . . . When Leo meets Durden there there is another man with Mr. Durden." This was a federal agent, Joseph Gordon, who was in an undercover capacity pretending he was the ultimate buyer. Durden was pretending that he was getting *the heroin for this man,* Joseph Gordon, who was actually a federal agent.

"The second sale was in January, I believe January 13th. . . . You see the order then goes for Lovato to give Durden the heroin." (R.T. 22).

Durden is there again with Joseph Gordon, "pretending he is an ultimate purchaser of heroin, and Durden pretending he is getting the heroin for this ultimate purchaser Mr. Joseph Gordon. The final sale on February 6th, and this is the day of the arrest. The defendants were all arrested on February 6th." (R.T. 22).

The foregoing three government soliciated transactions, engineered with agent Joseph Gordon by John Durden, are the sole basis of the charges of "conspiracy" contained in Count Five against the defendants Robert Butler and Ted Dean Butler. All the telephone calls were prearranged with the narcotic agents and to be taped.

As the prosecutor told the second jury, the agents proposed to Durden "that he make telephone calls . . . and try to arrange heroin sales to try to find out where the heroin was going". (R.T. 17-18, second trial). "The evidence will show and Mr. Durden will testify that the agents told him to *arrange* heroin sales as I told you. So you will see that Mr. Durden did *arrange* for three distributions of heroin from Lovato. . . . Durden was pretending that he was getting the heroin for this man, Joseph Gordon, who was actually a federal agent." (R.T. 22, second trial).

All three alleged sales were made to Joseph Gordon, an undercover agent. None revealed any transaction with Butler, or either of them.

At the outset, an attack was made on the constitu-

tionality of Sections 331(q)(2) and (3) of Title 21, and Section 360 (a)(b) and (c) of Title 21 as being in violation of the Fifth Amendment to the Constitution of the United States, and that they were too vague, indefinite and uncertain to constitute a criminal offense. The Court overruled the objections to the statute. (R.T. 871, first trial).

On objections by the Butlers and other defendants that Count One and Count Five set up two conspiracies in the same indictment, Count One of which involved amphetamines and barbiturates and Count Five involved heroin, the Court severed Count Five from Count One, but the government did not proceed to a new indictment as to Count Five and the Court permitted the government to try the defendants on the same indictment before two juries. Defendants Ted Dean Butler and Robert Butler entered pleas of once in jeopardy at the outset of the second trial. After the trial started, Hilaria Aguilar was permitted to withdraw her plea to the indictment and an information was filed against her charging a tax count, to which she entered a plea of guilty.

The Court denied judgments of acquittal on Count One in the first trial and denied judgments of acquittal on Count Five in the second trial. He sentenced Ted Dean Butler (R.T. 884) to two years imprisonment on Count One and five years on Count Five, the sentences to run concurrently. Robert Butler was sentenced to the custody of the Attorney General for two years on

Count One and seven years on Count Five. (R.T. 887) the sentences to run concurrently.

After the evidence in the first trial ended, the trial Judge insisted on going ahead with the selection of another jury on the same indictment involving Count Five of the indictment, another conspiracy in which it was alleged that only heroin was involved. The defendants, and each of them, pleaded once in jeopardy and the Court then and later overruled the pleas and overruled the motions for judgments of acquittal, arrest of judgment and for new trial. (R.T. 870).

The Court also overruled attacks on the constitutionality of the statute as being too vague, indefinite and uncertain in Sections 331(q)(2) and (3) of Title 21 and Section 260 (a)(b) and (c) of Title 21 as being in violation of the Fifth Amendment to the Constitution of the United States. (R.T. 871).

The Court also read to the jury Title 21, Section 173 which was not charged. The Court denied objections to the lack of foundation for books that were introduced in the record and also denied the motions for acquittal and for new trial and in arrest of judgment. (R.T. 881).

When Joseph Lovato was arrested on February 6, the officers obtained a purported consent to search his garage. There was a footlocker in his garage which contained amphetamines and barbiturates and what appeared to be a ledger book, which was taken into cus-

tody. The ledger book and its writings were never identified as to who or how the notations were made in it or when and defense counsel was forbidden from cross-examining the officers with reference to this alleged consent or this search and seizure, which denied the defendants the right of confrontation of vital evidence against them.

Also, Robert Sternaman, one of the government agents, testified he searched through Joseph Leo Lovato's trash, which had been placed into the street in a closed, plastic bag container, for which he had no consent and which he claimed he found a phone number, which number was a telephone number of Bob Butler (Robert Butler). It was not shown, however, as to what telephone calls, if any, were made or for what purpose. Robert Butler had a teenage dress shop and the Lovatos had minor children.

At no time did the evidence show the actual presence of heroin in the possession of Robert Butler. At no time is it shown by the evidence that Butler ever was at the Lovato residence. At no time was it shown that any of the three alleged and manufactured sales of heroin went to or were destined to go to the Butlers.

Ted Dean Butler testified that he was 25 years old, married and had two children. (R.T. 752). He said he worked for Durden in a motel owned by Durden. His job was cleaning up, making the beds around the motel, vacuuming, washing walls, driving Durden's car. (R.T. 753). He said Durden was paying his rent,

(R.T. 754) and sent him on various errands. He said he had a call from Durden with reference to delivering a package to "Tommy". (R.T. 757). He was to take a package from Leo Lovato to Tommy. (R.T. 756-757) He said he did not know its contents. Tommy, he said, owned a hot dog stand. (R.T. 758). The package was about 2½ x 2½ or 3 x 3. It was in a plastic sandwich bag and the bag had a knot on the end of it. He could not see the contents because it had aluminum foil wrapped around it. Ted Butler was a handy boy employed by Durden.

"Q. Did you know what was in it?
"A. No, I didn't." (R.T. 758, second trial)

This was uncontradicted.

He said he received some money from Tommy. It was $500. Mr. Durden got it. R.T. 760). He said he did not receive anything. (R.T. 760) He said he received another package from Durden to take to Tommy and that was when he got the $500 which he turned over to Durden. (R.T. 761).

Asked if he had ever been convicted of a felony, he said when he was 19 years old he was implicated in an armed robbery and was later reduced to unarmed robbery and he received probation for it (R.T. 762).

The prosecutor was allowed to cross-examine Ted Butler over objection regarding matters not brought out on direct examination in connection with the book

found in Lovato's garage and also with reference to taped conversations not brought out on direct examination. The Court overruled objections from R.T. 769 to R.T. 775.

The Court overruled an objection to cross-examination regarding tape recordings. (R.T. 775-794).

The tests by the chemist showed a mixture of the substance with a dark brown, almost black, substance. The chemist only removed a small amount, the tip of a spatula. (R.T. 399). The percentage of heroin, according to him, was 74.1. The only thing he determined that was present was cocaine. (R.T. 401). The chemist did not know the formula of heroin. (R.T. 396-397) He said the material "contained heroin". The prosecutor kept insisting on asking whether the substance was heroin although the witness answered earlier that "The material contains heroin". (R.T. 395). The chemist made a composite from which he determined that 74 something percent heroin. (R.T. 403). He did not determine what percentage in each bag that he tested contained heroin. Neither of the two chemists knew the chemical formula for heroin.

The Court instructed the jury in the first trial that "amphetamine is a stimulant drug and that barbiturate is a depressant drug within the terms of Title 21 U.S.C., the portions of which I have read to you previously." (R.T. 2090).

This was without any testimony by any expert that

amphetamine is a stimulant drug and that barbiturate is a depresant drug within the terms of Title 21 U.S.C. Nor was there any evidence introduced to show that the Secretary had made a legal determination pursuant to the provisions of Section 360(a) that the drugs in evidence were stimulant or depressant within the meaning of the statute. Nor was there any evidence that these particular drugs are dangerous drugs.

This invaded the province of the jury to find whether the drugs were stimulant or depressant or dangerous. It was a fact determination required by the Seventh Amendment to the Constitution and one that the Judge was not to make, and his having done so was prejudicial error.

In the oral argument before the Court of Appeals, under questioning by Circuit Court Judge Walter Ely, government counsel admitted that he was thinking of having Durden plead to a misdemeanor, but that he had not disclosed this matter to defense counsel. He was closely questioned by Judge Ely on whether he did not think he had a duty to do so. The colloquy was not written up, although counsel for these appellants asked the Court to have it writtn up and made a part of the record. We renew this request. This was not done and the Court's opinion contains no comment or discussion about this, nor does the Court pass upon the suppression of the evidence and the command of the trial Court not to argue to the jury the promises made to Durden.

The Court also denied the pleas of once in jeopardy without permitting or taking any evidence.

The Court also failed to discuss the mass of telephone evidence taped by federal agents sitting next to Durden and invading the home and office of the appellants Butler.

The Court also erroneously permitted transcripts of the two-way conversation between the defendants and Durden, acting as a government agent, to be read and heard by the jury, part of which was not admitted in evidence as hearsay, but nevertheless read to the jury or listened to by them for the alleged purpose of making the other half of the conversation understandable.

QUESTIONS PRESENTED

1. Whether the suppression of the true facts with relation to the deal made by the government with Durden violated due process of law guaranteed by the Fifth Amendment to the Constitution of the United States and deprived the defendants of their constitutional right of full cross-examination to attack Durden's credibility, and fair trial.

2. Whether the failure to disclose frankly all the details of the deal with Durden violated this Court's holding in *Napue v. Illinois*, 360 US 264, 3 L.ed.2d 1217, *Brady v. Maryland*, 373 US 83, 10 L.ed.2d 215, and *Giglio v. U.S.*, 31 L.ed.2d 104.

3. Whether two trials before two juries and two separate judgments and two sentences could be returned on one indictment without violating the Fifth Amendment provisions against double jeopardy.

4. Whether the issue of one conspiracy with several objects or multiple conspiracies should have been submitted to the jury.

5. Whether Title 21 U.S.C. Secs. 331(q)(2) and (3) are too vague and indefinite to constitute penal legislation and violate the Fifth Amendment to the Constitution of the United States.

6. Whether there is any proof of conspiracy by defendants as charged in Count One of the indictment.

7. Whether there is any conspiracy by defendants as charged in Count Five of the indictment.

7a. Whether solicitation by Durden at request of government agents created a "conspiracy" involving appellants and whether such conduct was against public policy. *Sherman v. U.S.* 356 U.S. 369 2 L.ed (2) 848; *Sorvalls v. U.S.* 287 U.S. 435, 453; *Vemstead v. U.S.* 277 U.S. 438, 470; *McNabb v. U.S.* 319 U.S. 332, 341.

8. Whether the government witness John Durden was making an illegal search for evidence in violation of the Fourth and Fifth Amendments to the Constitution of the United States, and constructing a crime. *Wong Sun v. U.S.* 371 U.S. 471, 483, 486.

9. Whether the use of the telephone violated both

California law and federal law where the telephone was used without the consent of the telephone company or a magistrate and whether it violated the Fourth and Fifth Amendments to the Constitution of the United States.

10. Whether the interviews by Durden on behalf and direction of government agents of the defendants, or either of them, violated their rights under the Fifth Amendment against self-incrimination.

11. Whether a telephone number found by a federal agent in an unauthoribed search of a trash bag in front of Lovator's house, which handwriting was not identified nor the reason for the number being there, fatally infected the verdict in the light of the case of *People v. Krivda,* 5 Cal.3d 357 and 8 Cal.3d 623 and *Krivda v. California,* 34 L.ed. 2d 45.

12. Whether the government was required to get consent of the telephone company for its use of the telephone by Durden and whether such evidence was illegally secured in the light of *People v. Treiber,* 28 Cal.2d 657.

13. Whether the government agents were required to get the consent of a Court or Magistrate in order to make use of the telephone to invade the privacy of the Butlers and record the conversations.

14. Whether the telephonic conversations with Ted Butler violated the rule set down by this Court in *Massiah v. U.S.,* 377 US 201, 12 L.ed.2d 246. *Miranda v. Arizona* 384 U.S. 436, 457.

15. Whether the narrations on the telephone were an alleged search by Durden for evidence and merely narrations of past events or relationships and no proof of any conspiracy to violate any law.

16. Whether the alleged 4 conspiracies charged in the indictment are one conspiracy with many objects or two conspiracies. *Braverman v. U.S.* 317 U.S. 49; *U.S. v. Gilboy* 160 Fed. Sup. 442; *Ingram v. U.S.* 360 U.S. 672.

17. Whether the Butlers had standing to challenge and cross-examine federal agents regarding Lovatos and other dependents.

18. Whether judgments of acquital should have been granted.

REASONS FOR GRANTING THE WRIT

I

It is important for this Court to grant a hearing to determine the rights and duties of Courts to compel complete and truthful disclosures of deals that are made by the government for the testimony of witnesses and for the right to compel full disclosure of all the details so that no party who is affected is deprived of bringing out all of the facts before the jury. (*Napue v. Illinois,* 360 US 264, 3 L.ed.2d 1217; *Brady v. Maryland,* 373 US 83, 10 L.ed.2d 215; *Giglio v. U.S.,* 31 L.ed.2d 104).

The government is to be commended in keeping its

deal with Durden and dismissing the case two months after the trial concluded, *Santchello v. New York* 404 U.S. 257, 30 L.ed (2) 427, but they must be condemned and the case reversed because they permitted the true facts to be suppressed and the defendants falsely deprived of their rights to bring forth the credibility or lack of credibility of Durden in the trials.

Napue v. Illinois, 360 U.S. 264; *Giglio v. U.S.* 31 L.ed(2) 104.

By analogy in *Hoffa v. U.S.,* 385 US 293, 17 L.ed. 2d 374, Chief Justice Earl Warren said:

> "... Here, Edward Partin, ajailbird languishing in a Louisiana jail under indictments for such state and federal crimes as embezzlement, kidnapping, and manslaughter (and soon to be charged with perjury and assault), contacted federal authorities and told them he was willing to become, and would be useful, as an informer against Hoffa who was then about to be tried in the Test Fleet case. A motive for his doing this is immediately apjarent—namely, his strong desire to work his way out of jail and out of his various legal entanglements with the State and Federal Governments. And it is interesting to note that, if this was his motive, he has been uniquely successful in satisfying it. In the four years since he first volunteered to be an informer against Hoffa he has not been prosecuted on any of the serious federal charges for which he was at that time jailed, and the state charges have apparently vanished into thin air.
>
> "Shortly after Partin made contact with the

federal authorities and told them of his position in the Baton Rouge Local of the Teamsters Union and of his acquaintance with Hoffa, his bail was suddenly reduced from $50,000 to $5,000 and he was released from jail. He immediately telephoned Hoffa, who was then in New Jersey, and, by collaborating with a state law enforcement official, surreptitiously made a tape recording of the conversation. A copy of the recording was furnished to federal authorities. Again on a pretext of wanting to talk with Huffa regarding Partin's legal difficulties, Partin telephoned Hoffa a few weeks later and succeeded in making a date to meet in Nashville where Hoffa and his attorneys were then preparing for the Test Fleet trial. Unknown to Hoffa, this call was also recorded and again federal authorities were informed as to the details.

* * *

"Everything Partin saw or heard was reported to federal authorities and much of it was ultimately the subject matter of his testimony in this case. For his services he was well paid by the Government, both through devious and secret support payments to his wife and, it may be inferred, by executed promises not to pursue the indictments under which he was charged at the time he became an informer.

"This type of informer and the uses to which he was put in this case evidence a serious potential for undermining the integrity of the truth-finding process in the federal courts. Given the incentives and background of Partin, no conviction should be allowed to stand when based heavily on his

testimony. And that is exactly the quicksand upon which these convictions rest, because without Partin, who was the principal government witness, there would probably have been no convictions here. Thus, although petitioners make their main arguments on constitutional grounds and raise serious Fourth and Sixth Amendment questions, it should not even be necessary for the Court to reach those questions. For the affront to the quality and fairness of federal law enforcement which this case presents is sufficient to require an exercise of our supervisory powers. As we said in ordering a new trial in *Mesarsh v. United States,* 352 U.S. 1, 14, 1 L.ed. 2d 1, 9, 77 S. Ct. 1 (1956), a federal case involving the testimony of an unsavory informer who, the Government admitted, had committed perjury in other cases:

"'This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity.

* * * * *

" 'The government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with them.'

"See also *McNabb v. United States,* 318 U.S. 332, 341, 87 L. Ed. 819, 824, 63 S.Ct. 608 (1943).

* * *

"Here the Government reaches into the jailhouse to employ a man who was himself facing in-

dictments far more serious (and later including one for perjury) than the one confronting the man against whom he offered to inform. It employed him not for the purpose of testifying to something that had already happened, but rather for the purpose of infiltration to see if crimes would in the future be committed. The Government in its zeal even assisted him in gaining a position from which he could be a witness to the confidential relationship of attorney and client engaged in the preparation of a criminal defense. And, for the dubious evidence thus obtained, the Government paid an enormous price. **Certainly if a criminal defendant insinuated his informer into the prosecution's camp in this manner he would be guiltiy of obstructing justice. I cannot agree that what happened in this case is in keeping with the standards of justice in our federal system and I must, therefore, dissent."**

The analogy between Partin and Durden is clear, paraphrasing it "Because without Durden, who was the principal government witness, there would probably have been no convictions here. * * * The government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with them."

II

There is no authority that we can find for two trials before two juries with two punishments on the same indictment.

The trial of Count One on indictment No. 5902, we respectfully submit, exhausted the jurisdiction of the Court when it was placed before a jury.

The prosecutor may carve as large a morsel as the charge will permit, but he can carve but once. (*People v. Stephens, 79 Cal. 428; Ex parte Lange,* 18 Wall. 163, 21 L.ed. 872; *U.S. Benz,* 282 U.S. 304, 307, 75 L.ed. 354, 356, 357; *U.S. v. Sacco,* 367 F.2d 368; *U.S. v. Adams,* 362 F.2d 210; *Kennedy v. U.S.,* 330 F.2d 26; Fifth Amendment, U.S Constitution)

"The policy of the Bill of Rights is to make rare indeed the occasion when the citizen can for the same offense be required to run the gauntlet twice. The risk of judicial arbitrariness rests where, in my view, the Constitution puts it—on the government." (*Gori v. U.S.,* 367 U.S. 364, 372, 373, 6 L.ed.2d 901, 907; *North Carolina v. Pierce,* 395 U.S. 711; *Greene v. U.S.,* 355 U.S. 184, 2 L.ed. 2d 199)

Neither a prosecutor nor a court may amend or alter an indictment. (*Ex parte Bain,* 121 U.S. 1)

Once it has withdrawn part of the indictment from considreation by the jury, neither the court nor prosecutor can breathe life into another part of the indictment.

The court having determined that Count Five would be prejudicial to be tried together with Count One in effect held that the two alleged conspiracies were improperly joined in a single indictment. Jeopardy had

therefore attached, at least to the defendants with reference to Count Five in indictment No. 5902.

The court's ruling may also have the effect of nullifying Count One as having been returned by a grand jury which necessarily was prejudicially infected by the presentation of both the matters relating to Count One and Count Five in a single indictment.

III

The Court failed to instruct the jury on multiple conspiracies in connection with the indictment and was required to instruct the jury to decide whether there was more than one conspiracy.

The failure to instruct on multiple conspiracies was the decisional fulcrum of *U.S. v. Varelli,* 407 F.2d at 746-47. See: *U.S. v. Bless,* 422 F.2d 210, 213, n. 1; *Kotteakos v. U.S.,* 328 U.S. 769-70, 772; *U.S. v. Kelly,* 349 F.2d 720, 757; *U.S. v. Romano,* 421 F.2d 792, 801; *U.S. v. Soles,* 401 F. 2d 521, cert. den. sub nom. *Nelson v. U.S.,* 394 U.S. 931.

IV

The evidence is entirely insufficient to establish conspiracy.

There is not a scintilla of evidence that Robert Butler possessed for sale or possessed or sold amphetamine tablets and barbituate capsules or that he agreed to do so. Nor is there any evidence that these were

dangerous drugs or had been found to be such in accordance with the provisions of Section 360(a) of Title 21. Nor is there any evidence of possession of heroin except one instance of Butler as a delivery boy.

It was the duty of the jury under the Seventh Amendment to find the Court in instructing the jury invaded the province of the jury in telling the jury, when there was no evidence presented to it, "that amphetamine is a stimulant drug" or that "barbiturates is a depressant drug" within the meaning of the section. Nor did the Court instruct the jury in the language of the indictment itself, charging that these are "dangerous drugs," when there was no expert testimony or other testimony that the Secretary had made a determination as to the character of either amphetamine or barbiturate, or what percentage of the pills or capsules had to be actually the drug in question.

At this point we also attack the statute and the language of it as violative of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States, requiring a statute to be so clear that a citizen may know by the simple reading of it whether he has violated the law. (*Connelly v. General Construction Co.*, 269 U.S. 385, 391, 70 L.ed. 322, 328)

The language of the statute is in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.

See also: *Ashton v. Kentucky*, 384 U.S. 195, 200-201, 16 L.ed.2d 469; *Winters v. New York*, 333 U.S.

507, 92 L.ed. 840; *Lanzetta v. New Jersey,* 306 U.S. 451, 453, 83 L.ed. 888; *Jordan v. DeGeorge,* 341 U.S. 223, 230, 95 L.ed. 886; *Watkins v. U.S.,* 354 U.S. 178, 208, 209, 1 L.ed.2d 1273, 1295, 1296; *Flaxer v. U.S.,* 358 U.S. 147, 151, 3 L.ed.2d 183, 186; *Raley v. Ohio,* 360 U.S. 423, 438, 439, 3 L.ed.2d 1344, 1356; *Brown v. Louisiana,* 383 U.S. 131, 15 L.ed.2d 637.

There is no proof of conspiracy of this sale titled "sales" by Durden to a narcotics agent.

In *Ong Way Jong v. U.S.,* 245 F.ed 392, the Court held: (1) That before one can be proven to be a conspirator and bound by admissions of a coconspirator, there must be some evidence produced of a conspiracy, and of his connection with the crime; (2) That "conspiracy" is a partnership in criminal purposes, and the gist of the crime is the confederation or combination of minds, and to infer guilt from mere association between conspirators does not meet the necessary test; and (3) That evidence was insufficient to sustain conviction of conspiracy to sell, conceal and transport narcotic drugs. The Court there said, at page 395:

> "This was all the competent evidence produced by the government against Ong. As is apparent, there is not a scintilla of evidence that Ong was guilty of conspiring to sell narcotics. He is not shown to have touched, possessed, sold or conspired to sell narcotics. The overt acts alleged in the indictment are entirely innocuous. Ong is not shown to have received, used, passed or touched any money used in the transaction of February 1."

Where the cooperation of two people is necessary to complete an act, which when consummated is a crime, such cooperation constitutes a substantive crime and may not be bent to conspiracy to commit that attempt. (*Gebardi v. U.S.*, 287 U.S. 112, 77 L.ed. 206; *U.S. v. Dietrich*, 126 F. 664; *U.S. v. Sager*, 49 F.2d 725; *Shannon v. Com.*, 14 Pa. 226; *State v. Law*, 189 Iowa 910, 179 NW 145; 2 Wharton, Crim. Law, 11th ed. Sec. 1602, p. 1746; *Corbett v. U.S.*, 229 F. 27)

In *U.S. v. Zeuli*, 137 F.2d 845, the Court held that if a crime necessarily involves mutual cooperation of two persons and they have in fact committed the crime, they have not been shown to have been in a conspiracy and to be convicted of a conspiracy to commit it. The Court said:

> "Lower federal courts have several times decided that, if a crime necesarily involves the mutual cooperation of two persons, and if they have in fact committed the crime, they may not be convicted of a conspiracy to commit it. *United States v. Dietrich*, C.C., 126 F. 664 (Van Devanter and Munger, JJ.); *United States v. New York Central & H.R.R. Co.* C.C., 146 F. 298 (Hold. D.J.); *United States v. Sager*, 2 Cir., 49 F.2d 725, 727, 728. Although the Supreme Court has never actually so decided, it has twice clearly approved the doctrine; and we accept it as settled law. *United States v. Katz*, 271 U.S. 354, 355, 46 S.Ct. 513, 70 L.Ed. 986; *Gebardi v. United States*, 287 U.S. 112, 122, 53 S.Ct. 35, 77 L.Ed. 206, 84 ALR 370.

V

Therefore, if the conspiracy was confined to the transaction between Zeuli and Steneck by which the stolen books were sold, although both were guilty of the substantive crime, neither was guilty of conspiracy. The indictment was not so confined; it laid a single conspiracy which comprehended not only the disposal of the books but the original theft of them. Such a conspiracy was not within the doctrine we have just mentioned, for it covered more than the crime of receiving. The difficulty was not therefore in the indictment but in the proof, for the prosecution did not connect Zeuli with the preliminary theft, or with the books at all until after they had been stolen, and at a time when nothing more remained to be done but to dispose of them."

See also: *U.S. v. Falcone,* 311 U.S. 205, 61 S.Ct. 204, 85 L.ed. 128.

Taking the opening statement of the prosecutor in the second trial as the facts it is apparent Durden's telephone calls to the appellants Butler was merely an exploratory search for evidence and violated the Fourth and Fifth Amendments to the Constitution of the United States. Neither had committed a crime nor "conspired to commit one." Durden was asked to solicit them to commit one.

Durden and the officer sitting next to him were the uninvited ear and oral statements overheard and

the fruits of their illegal overhearing are subject to suppression for violation of the Fourth Amendment rights. (*Alderman v. U.S.*, 394 U.S. 165, 171; *Silverman v. U.S.*, 365 U.S. 505, 5 L.ed.2d 734; *Katz v. U.S.*, 389 U.S. 347, 19 L.ed. 2d 576)

VI

This court should determine that state law controls the use of the telephone and whether before they are used by officers and their informers, permission must be secured from the telephone company and from the Courts of the state. (*People v. Treiber*, 28 Cal.2d 657)

VII

Durden's interrogations were really the interrogations of the officers and without the *Miranda* warning, they were illegally obtained in violation of the Fifth Amendment. (*Griffin v. California*, 380 U.S. 609, 14 L.ed.2d 106); *Miranda v. Arizona*, 386 U.S. 436, 457, et seq.; *Olson Steed v. U.S.*, 2774-5, 438, 485; *Malloy v. Hogan*, 378 U.S. 68; 12 L.ed.2d 653, 659.

What the officers were doing indirectly could not have been done by them directly. The inquiries were illegally; likewise the telephone calls to Ted Dean Butler after he was arrested and arraigned violated *Massiah v. U.S.*, 377 U.S. 201, 12 L.ed 2d 356.

VIII

In spying on Lovato's residence, federal agents ecured trash bags in front of Lovato''s house They secretly had the bags removed and examined the contents and extracted such evidence as they wished. They had no search warrant or other legal process. In one of the bags a slip of paper had the number of Robert Butler, which was his place of business, his dress shop. Nevertheless, the prosecutor made much of this number although no foundation was laid for the writing, its use in any way and such use was the fruit of the poisonous tree and infected the fairness of the verdict. Appellants were denied standing to cross-examine.

IX

The government experts tested a very small quantity of either the pills or barbiturates and later what was claimed in the second trial to be heroin. Neither expert was able to give the chemical formulae for amphetamines, for barbiturates or for heroin. The chemical formula is something every schoolboy learns in a chemistry course in school. The evidence failed to establish any foundation for establishing the alleged drugs charged to be violations.

On cross-examination the government's expert, James Look was asked:

> "Q. Mr. Look, what is the chemical formula for amphetamine sulfate?

"THE WITNESS: . . . No, I can't repeat it. (R.T. 1357)

"Q. Will you read the formula?

"A. No, I can't read the formula . . . (R.T. 1358) The nomenclature is very hard for me to remember the exact wording of it."

X

The telephone conversations, half of which were not part of what went to the jury (nor this court) although the Court permitted their contents to be placed before the jury, permitted the jury to considre hearsay evidence to reach its verdict.

XI

The Court invaded the province of the jury in his instruction as to whether the substances involved were a stimulant (emphetamines) or a depressant (barbiturates).

The Court had a duty to submit to the jury whether amphetamine is a stimulant drug and whether the quantity is such as to be a useable quantity and whether a barbituate involved in the case is a useable depressant drug within the meaning of the statute. The Court's instruction (R.T. 2090) took this factual determination away from the jury and thus invaded its province given to it by the Seventh Amendment. It is a matter of almost common knowledge that weight reducing remedies were based upon amphetamines and is de-

fined by Webster's Dictionary as a substance frequently used as a nasal spray. Barbiturates are described as a sedative. But whether the evidence in this case revealed a usable quantity of either of t h e m was not presented to or decided by the jury, nor was there any factual determination by the Secretary pursuant to the provisions of Section 360(a) that the drugs in evidence were stimulant or depressant within the meaning of the statute or whether there could be a conviction without such determination and without expert testimony presented to the jury.

Several errors appears in the court's opinion.

1. The court refers to John Durden as a "co-operating unindicted conspirator." The fact is that he was indicted on the same charge along with Ted Butler, but the indictment was returned in another courtroom, to-wit Judge Andrew Hauk's court for both defendants. Both were represented by counsel. Later another indictment was returned in the courtroom of Judge Crary,, charging the same drug acts and naming the petitioners herein along with John Durden as an unindicted co-conspirator in this trial. The other indictment remained pending and was continued from time to time until it was dismissed. The facts regarding the deal made to dismiss t h i s indictment before Judge Hawk were never fully or frankly disclosed in the other courtroom.

. . . . .

There is a sharp difference between a Partin in the

Hoffa case, who did not solicit Hoffa to engage in jury tampering, and the petitioners herein, regarding whom Durden was instructed to conduct an exploratory search for evidence and to engage in solicitation of distribution and sales of narcotics, as in this case. The Lewis and Lopez case are likewise distinguishable. Neither agent was conducting an exploratory search for evidence as in this case.

The statement in the opinion endeavoring to distinguish this case from Massiah and Escobido again mistakes the facts, stating "At the time of the recorded telephone calls, appellants were not indicted and were not represented by counsel as in Massiah" etc. Ted Butler had been indicted along with Durden shortly after their first arrest and at all times was represented by counsel, covering the same charge but filed in another court. Assume that the officers sitting alongside Durden when Durden telephoned and had asked them to come to their headquarter would anyone doubt that they would have been required to give the Miranda warning?

Because they spoke through the voice of Durden and through the telephone could they escape the duty of giving the Miranda a warning? Could they circumvent the mandates of Miranda, Massiah and Escobido by using a dummy to speak their words deceptively? The learned judge who wrote the opinion of the Court of Appeals finds that under the circumstances the right to counsel, so long upheld as a requirement of

due process, may be ignored and mutated, by the use of an informer, or the voice of someone who may not be identified, to deny a great constitutional right. See *Powell v. Alabama* 287 U.S. 45; *Gouled v. U.S.* 255 U.S. 298; *Sherman v. U.S.* 356 U.S. 369; *Silverman v. U.S.* 365 U.S. 505; *Black v. U.S.* 385 U.S. 385 U.S. 26; *U.S. v. Schipani* 362 F(2) 825.

The credibility of Durden, the informer, was highly important, as shown by the footnotes of the opinion, which rely on Durden's statements and telephone conversation. Yet the trial court would not allow argument to the jury that Durden was a liar, whose statements that he would receive a dismissal of all serious charges which existed against him, would be made in exchange for his testimony. Yet two months after the case concluded the charges against Durden were dismissed. Did not this prove beyond a shadow of of a doubt that there had been false and misleading statements to the defense and to the court and jury?

The Court of Appeals admits error in taking papers from the trash container by the officers and searching them. Among these papers was a slip containing a telephone number of Robert Butler. No cross examination by Butler's attorney was allowed. No certification was made by the Court of Appeals that this did not fatally infect the verdict (*Chapman v. California* 386 U.S. 18.)

Other errors were aserted by the Court of Appeals, but they held these harmless. Nevertheless they failed

to certify that these errors did not fatally affect the verdict beyond a reasonable doubt. (*Chapman v. California* 386 U.S. 18.)

We submit that many important constitutional and legal issues require the resolution of this Court in the fair administration of justice and in its supervisory capacity over the federal criminal courts and that a hearing should be granted and the judgments reversed.

WHEREFORE, appellants pray that this Honorable Court grant certiorari and reverse the judgments below as to each petitoner.

Respectfully submitted,

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